

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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SHAQUANA H., O/B/O D.H., JR.,

Plaintiff,

v.

Civil Action No.  
5:19-CV-1124 (DEP)

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

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APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

OLINSKY LAW GROUP  
300 South State Street  
Syracuse, NY 13202

MELISSA PALMER, ESQ.

FOR DEFENDANT

HON. ANTOINETTE L. BACON  
Acting United States Attorney  
P.O. Box 7198  
100 S. Clinton Street  
Syracuse, NY 13261-7198

HUGH D. RAPPAPORT, ESQ.  
Special Assistant U.S. Attorney

DAVID E. PEEBLES  
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff

seeks judicial review of an adverse administrative determination by the Commissioner of Social Security, pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), are cross-motions for judgment on the pleadings.<sup>1</sup> Oral argument was heard in connection with those motions on November 22, 2020, during a telephone conference conducted on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination resulted from the application of proper legal principles and is supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is hereby

ORDERED, as follows:

- 1) Defendant's motion for judgment on the pleadings is

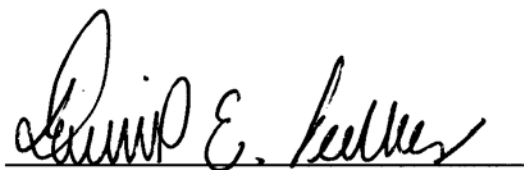
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<sup>1</sup> This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

GRANTED.

2) The Commissioner's determination that the plaintiff's son was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is AFFIRMED.

3) The clerk is respectfully directed to enter judgment, based upon this determination, DISMISSING plaintiff's complaint in its entirety.

A handwritten signature in black ink, appearing to read "David E. Peebles", is written over a horizontal line.

David E. Peebles  
U.S. Magistrate Judge

Dated: November 16, 2020  
Syracuse, NY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----x  
SHAQUANA H., O/B/O D.H., JR.,

Plaintiff,

-v-

5:19-CV-1124

COMMISSIONER OF SOCIAL SECURITY,

Defendant.  
-----x

**TRANSCRIPT OF PROCEEDINGS**  
**BEFORE THE HONORABLE DAVID E. PEEBLES**  
November 5, 2020  
100 South Clinton Street, Syracuse, New York

For the Plaintiff:  
(Appearance by telephone)

OLINSKY LAW GROUP  
300 South State Street  
Suite 420  
Syracuse, New York 13202  
BY: **MELISSA A. PALMER, ESQ.**

For the Defendant:  
(Appearance by telephone)

SOCIAL SECURITY ADMINISTRATION  
J.F.K. Federal Building, Room 625  
15 New Sudbury Street  
Boston, Massachusetts 02203  
BY: **HUGH RAPPAPORT, ESQ.**

*Hannah F. Cavanaugh, RPR, CRR, CSR, NYACR, NYRCR*  
*Official United States Court Reporter*  
*100 South Clinton Street*  
*Syracuse, New York 13261-7367*  
*(315) 234-8545*

1 (The Court and all parties present by telephone.  
2 Time noted: 1:23 p.m.)

3 THE COURT: Let me begin by thanking you both for  
4 excellent presentations. I found this to be a fascinating case  
5 and somewhat out of the ordinary.

6 Plaintiff has commenced this proceeding on behalf of  
7 her infant -- I shouldn't say infant -- child/son to challenge  
8 an adverse determination by the Commissioner of Social Security  
9 finding at the relevant times that her son was not disabled and,  
10 therefore, ineligible for the Supplemental Security Income  
11 benefits sought. The challenge is brought pursuant to 42,  
12 United States Code, Sections 405(g) and 1383(c)(3).

13 The background is fairly easily stated and is as  
14 follows: The plaintiff's son was born in August of 2007. He is  
15 currently 13 years of age. He lives in Syracuse, New York in a  
16 house with his mother who is single. There is a father who is  
17 somewhat involved in the son's upbringing. Plaintiff's son  
18 attends Delaware Academy in Syracuse, New York. He is in  
19 special education classes for all subjects in a 12-to-1-to-1  
20 ratio setting. The plaintiff's son finished fifth grade in June  
21 of 2008. His fifth grade teacher was Brian Kerwin. Brian  
22 Kerwin has submitted a questionnaire response that is part of  
23 the record in this case and we'll discuss that in a moment.

24 Plaintiff is classified in his Individualized  
25 Educational Plan as learning disabled in reading and math.

1 That's at page 219. There is evidence of some past disciplinary  
2 issues, although as we'll discuss in a moment, there are also  
3 some positive reports concerning his behavior. Plaintiff  
4 started in regular classes and is still considered to be on  
5 track for a regents diploma.

6 Plaintiff was psychiatrically examined by Dr. Jeanne  
7 Shapiro on July 14, 2016, at a time when he was entering fourth  
8 grade. The report of Dr. Shapiro is at pages 286 to 289 of the  
9 Administrative Transcript. Dr. Shapiro did not make any  
10 psychiatric diagnosis, but did note that intellectual disability  
11 should be ruled out.

12 In terms of activities of daily living, plaintiff's  
13 son is able to groom and dress himself, although his mother  
14 testified that he does not do particularly well in matching  
15 clothes. My wife says I don't, either. He socializes with  
16 friends and family. He swims, plays outside, rides his bicycle,  
17 and plays video games and particularly likes a racing video  
18 game, according to his mother.

19 Procedurally, plaintiff applied for Supplemental  
20 Security Income Title XVI benefits on behalf of her son on  
21 May 20, 2016, claiming disability based on her son's learning  
22 disability, anger, and frustration at times, and aggressive  
23 behaviors at school. That's noted at page 145 of the  
24 Administrative Transcript.

25 A hearing was conducted on July 24, 2018, by

1 Administrative Law Judge Elizabeth Koennecke. ALJ Koennecke  
2 issued an unfavorable decision on September 18, 2018. That  
3 became a final determination of the agency on July 10, 2019,  
4 when the Social Security Administration Appeals Council denied  
5 plaintiff's request for a review. This action was commenced on  
6 September 11, 2019, and is timely.

7 In her decision, ALJ Koennecke applied the familiar  
8 three-step sequential test for determining childhood disability.  
9 At step one, she concluded that plaintiff's son had not engaged  
10 in substantial gainful activity during the relevant times.

11 At step two, she concluded that the plaintiff's son  
12 does suffer from severe impairments, including communication  
13 impairment and learning disability as falling within the  
14 category of 20 C.F.R. Section 416.924(c).

15 At step three, ALJ Koennecke first concluded that  
16 plaintiff's impairments do not meet or medically equal in  
17 severity any of the listed presumptively disabling conditions  
18 set forth in the Commissioner's regulations. She then went on  
19 to determine whether the plaintiff's impairments were  
20 functionally equivalent to any of the listed impairments and  
21 found that there were not extreme or -- actually, one extreme or  
22 two marked limitations in those domains and, therefore,  
23 concluded that plaintiff was not disabled at the relevant times.

24 As the Commissioner has noted, the Court's role is to  
25 determine whether correct legal principles were applied and

1 substantial evidence supports the resulting determination. The  
2 Second Circuit has noted, including in *Brault v. Social Security*  
3 *Administration*, 683 F.3d 443 from June of 2012, that this is a  
4 demanding standard. It is, perhaps, even more exacting than the  
5 clearly erroneous standard. The Circuit noted in that case that  
6 under the substantial evidence standard, once an ALJ finds a  
7 fact, that fact can be rejected only if a reasonable factfinder  
8 would have to conclude otherwise.

9           The plaintiff in this case contends that the  
10 Administrative Law Judge's determination is erroneous and,  
11 specifically, that she erred in not finding at least marked  
12 limitations in two of the domain areas, attending and completing  
13 tasks, and caring for yourself. The framework under which this  
14 case is analyzed comes from the 1996 enactment of the Personal  
15 Responsibility and Work Opportunity Reconciliation Act of 1996,  
16 which took effect on August 22, 1996. Under that act, an  
17 individual under the age of 18 is disabled and thus eligible for  
18 SSI benefits if he has a medically determinable physical and  
19 mental impairment which results in marked and severe functional  
20 limitations and which can be expected to result in death, or  
21 which has lasted or can be expected to last for a continuous  
22 period of not less than 12 months, 42, United States Code,  
23 Section 1383(c), subsection (A) (3) (C) (i).

24           By regulation, the agency has prescribed a three-step  
25 evaluative process, as Judge Koennecke noted, to be employed in



1 determining whether a child can meet the statutory definition of  
2 the disability, 20 C.F.R. Section 416.924. The first step which  
3 bears some similarity to the familiar five-step analysis  
4 employed in adult disability cases requires a determination of  
5 whether the child has engaged in substantial gainful activity.  
6 If not, then the test requires a determination of whether the  
7 child suffers from one or more medically determinable  
8 impairments that either singly, or in combination, are properly  
9 regarded as severe in that they cause more than a minimal  
10 functional limitation. If the existence of a severe impairment  
11 is discerned, the agency must then determine whether it meets or  
12 equals a presumptively disabling condition identified in the  
13 listing of impairments set forth in 24 C.F.R. Part 404, subpart  
14 P, appendix 1. In making that determination, equivalence to a  
15 listing can be either medical or functional.

16 Under final regulations which became effective on  
17 January 2, 2001, analysis of functionality is informed by  
18 consideration of how a claimant functions in six main areas  
19 denominated as domains. It is specified in 20 C.F.R. Section  
20 416.926(a). The domains are described as broad areas of  
21 functioning intended to capture all of what a child can or  
22 cannot do, and include: One, acquiring and using information;  
23 two, attending and completing tasks; three, interacting and  
24 relating with others; four, moving about and manipulating  
25 objects; five, caring for oneself; and six, health and physical

1 wellbeing.

2           Functional equivalence is established in the event of  
3 a finding of one extreme limitation, meaning more than marked,  
4 in a single domain. An extreme limitation is an impairment  
5 which interferes very seriously with the claimant's ability to  
6 independently initiate, sustain, or complete activities. That  
7 definition is found in 20 C.F.R. Section 416.926(a), subdivision  
8 (E)(3)(i). Alternatively, a finding of disability is warranted  
9 if a marked limitation is found in any of two of the listed  
10 domains. A marked limitation exists when an impairment  
11 interferes seriously with the claimant's ability to  
12 independently initiate, sustain, or complete activities.

13           A marked limitation may arise from several activities  
14 or functions that are impaired or even when only one is  
15 impaired, as long as the degree of limitation is such as to  
16 interfere seriously with the ability to function based on age  
17 appropriate expectations, independently, appropriately,  
18 effectively, and on a sustained basis. That's found at 20  
19 C.F.R. part 404, subpart P, appendix 1, Section 112.00(c).

20           In this case, as plaintiff's counsel has noted, when  
21 making this analysis, SSR 09-1p makes it clear that the whole  
22 child must be examined. That Social Security ruling provides as  
23 follows: We always evaluate the whole child when we make a  
24 finding regarding functional equivalence unless we can make a  
25 fully favorable determination or decision without having to do

1 so. The functional equivalence rules require us to begin by  
2 considering how the child functions every day and in all  
3 settings compared to other children the same age who do not have  
4 impairments.

5           The ruling goes on to state, you must consider the  
6 following questions: One, how does the child function?  
7 Functioning refers to a child's activities, that is everything a  
8 child does throughout the day at home, at school, and in the  
9 community such as getting dressed for school, cooperating with  
10 caregivers, playing with friends, and doing class assignments.  
11 We consider: What activities the child is able to perform, what  
12 activities the child is not able to perform, which of the  
13 child's activities are limited or restricted, where the child  
14 has difficulty with activities at home, in child care, at  
15 school, or in the community, whether the child has difficulty  
16 independently initiating, sustaining, or completing activities,  
17 the kind of help and how much help the child needs to do  
18 activities and how often the child needs it; and three, whether  
19 the child needs a structured or supportive setting, the type of  
20 structure or support a child needs, and how often the child  
21 needs it.

22           The first of the two domains at issue in this case is  
23 attending and completing tasks. The Administrative Law Judge  
24 addressed this domain in page -- pages 21 and 22 of the  
25 Administrative Transcript. That domain is addressed in Social

1 Security Ruling 09-4p. The ruling provides as follows in  
2 connection with that domain: In the domain of attending and  
3 completing tasks, we consider a child's ability to focus and  
4 maintain attention and to begin, carry through, and finish  
5 activities or tasks. We consider the child's ability to  
6 initiate and maintain attention, including the child's alertness  
7 and ability to focus on an activity or task despite distractions  
8 and to perform tasks in an appropriate pace. We also consider  
9 the child's ability to change focus after completing a task and  
10 to avoid impulsive thinking and acting. Finally, we evaluate  
11 the child's ability to organize, plan ahead, prioritize  
12 completing tasks, and manage time. Further on it states, the  
13 domain of attending and completing tasks covers only the mental  
14 aspects of task completion, such as the mental pace that a child  
15 can maintain to complete a task.

16 The ruling goes on to give examples depending upon  
17 the age of the claimant's child involved. When it comes to a  
18 child -- school aged children, which plaintiff's son qualifies  
19 as, the following examples are given: Focuses attention in a  
20 variety of situations in order to follow directions; complete  
21 school assignments and remembers and organizes school-related  
22 materials -- and these are examples of things that students  
23 should be able to do -- concentrates on details and avoids  
24 making careless mistakes; changes activities or routines without  
25 distracting self or others; sustains attention well enough to

1 participate in group sports; read alone; and complete family  
2 chores; completes a transition task without extra reminders or  
3 supervision, for example, changing clothes after the gym or  
4 going to another classroom at the end of a lesson.

5           In this case, the finding of the Administrative Law  
6 Judge that plaintiff's son has less than marked limitation in  
7 this domain is supported by several pieces of evidence. First  
8 is Dr. Shapiro's medical source statement. The statement at  
9 page 288 indicates that plaintiff's son appears to have no  
10 limitations in performing simple tasks. He has -- appears to  
11 have moderate limitations performing age appropriate complex  
12 tasks. He appears to have no limitations maintaining attention  
13 and concentration for tasks. He appears to have no limitation  
14 regarding his ability to learn new tasks. He appears to have  
15 mild limitations regarding his ability to make age appropriate  
16 decisions.

17           The finding in this domain is also supported by the  
18 conclusions of an agency consultant, Dr. Lieber-Diaz, rendered  
19 on August 31, 2016, and found at pages 61 through 70 of the  
20 Administrative Transcript. At page 66, Dr. Lieber-Diaz  
21 concludes that there's a less than marked limitation in this  
22 area and at the time he had access to Dr. Shapiro's report, as  
23 well as school district records, and -- although there is no  
24 indication of precisely what those records are. The -- and  
25 clearly, they did not include Mr. Kerwin's report which came

1 later.

2 Mr. Kerwin -- Mr. Kerwin's report also supports the  
3 finding in this domain. At page 241, there are listed 13  
4 categories and Mr. Kerwin finds only a serious problem in two  
5 categories, that would be focusing long enough to finish  
6 assigned activity or task and working at reasonable  
7 pace/finishing on time; and a very serious problem in one, that  
8 being working without distracting self or others. It is true,  
9 as plaintiff points out, that at page 242 Mr. Kerwin notes that  
10 the plaintiff's son needs a high level of support during  
11 activities and tends to be disruptive and distract peers if he's  
12 unsure how to do a task and that he needs to be in close  
13 proximity to the teacher.

14 The IEPs also appear to support this finding. At  
15 page 220, for example, the following is noted: Denzel -- and  
16 this is an IEP from June of 2008. Denzel is highly engaged  
17 during his interactive math lessons on the computer. Denzel  
18 always -- Denzel enjoys participating in kinesthetic activity  
19 both inside and outside of the classroom. He's demonstrated an  
20 interest for building structures with a variety of objects such  
21 as Legos. The claimant's son has exhibited positive emotions  
22 when he learns a new skill or answers a question correctly in  
23 front of his peers. He has shown a high level of interest in  
24 coding in which he excels for his age.

25 In social development, it is noted that the

1 claimant's son has shown the ability to form positive  
2 friendships with peers and interact appropriately with adults.  
3 He is a student well liked by his peers and adults in the  
4 building. He will set-up board games with his peers and has  
5 shown the ability to interact with friends appropriately.

6 In physical development, it was noted that he enjoys  
7 participating in kinesthetic activities. Physical education is  
8 his favorite special in school. He holds a high level of  
9 engagement during hands-on activities in the classroom, he  
10 shows, I'm sorry -- and he shows an interest in building  
11 structures with a variety of materials.

12 And on page 221, and perhaps this is more appropriate  
13 in the domain of caring for oneself, it's indicated that the  
14 student does not need a behavioral intervention plan.

15 The -- there's also support from the mother's  
16 testimony concerning what he is capable of doing, his enjoyment  
17 of video games, including racing video games. The domain -- so  
18 I find that there's substantial evidence to support the  
19 conclusion regarding attending and completing tasks.

20 I think it's a closer call with regard to caring for  
21 yourself. The Administrative Law Judge at page 23 and 24  
22 addressed this domain and concluded that plaintiff has a less  
23 than marked limitation in this area. The report of teacher  
24 Kerwin, the fifth grade teacher, of the ten categories broken  
25 out on page 244 finds a serious problem in three and -- I'm

1   sorry, in two and a very serious problem in three, including  
2   handling frustration appropriately, identifying and  
3   appropriately asserting emotional needs, and using appropriate  
4   coping skills to meet daily demands of a school environment.  
5   The -- I think the discussion on page 24 of why there was a  
6   finding of less than marked could have been more robust, but,  
7   again, it appears to be supported.

8           In this area, SSR 09-7p specifies that this domain  
9   considers a child's ability to maintain a healthy emotional and  
10   physical state and includes how well children get their  
11   emotional and physical wants and needs met in appropriate ways,  
12   how children cope with stress and changes in environment, and  
13   how well children take care of their own health, possessions,  
14   and living area. Examples of what a school aged child should do  
15   in this area includes recognizes circumstances that lead to  
16   feeling good and bad about himself, begins to develop  
17   understanding of what is right and wrong and what is acceptable  
18   and unacceptable behavior, demonstrates consistent control over  
19   behavior and avoids behaviors that are unsafe, begins to  
20   intimate more of the behavior of adults she knows -- he knows,  
21   performs most daily activities independently, for example,  
22   dressing and bathing, but may need to be reminded. The mother's  
23   testimony on that last point indicates that although the  
24   plaintiff's son is perhaps not the best at matching clothes, he  
25   is able to dress himself and groom.



1           The -- as I indicated before, the IEP from 2018  
2 indicates that no behavioral plan is needed. When it comes to  
3 stress, Dr. Shapiro noted at page 288 that there is no  
4 limitation with regard to stress -- I'm searching for the  
5 precise language. Ah, the last sentence. There appear to be no  
6 limitations regarding his ability to deal with stress, that's at  
7 page 288.

8           The -- Mr. Kerwin's report is somewhat troubling, and  
9 I acknowledge that plaintiff has cited a case, *Wells v.*  
10 *Berryhill* from the Western District of New York. It's found at  
11 2018 WL 3454687. It is from Senior District Judge David G.  
12 Larimer on July 18, 2018, that arguably would support a vacating  
13 of the Commissioner's determination and a remand, but the focus  
14 really is not on how I would have -- the Court would have  
15 interpreted Mr. Kerwin's report and others and what finding I  
16 would have made, but rather whether I can say that the  
17 Administrative Law Judge's finding is supported by substantial  
18 evidence. There is considerable evidence that does support the  
19 conclusion in this domain and, clearly, the evidence is  
20 equivocal.

21           I do note that Mr. Kerwin points out in this domain  
22 that the plaintiff's son was extremely well behaved from  
23 September 2017 to January 2018, that's at page 245 of the  
24 Administrative Transcript, and that he apparently started acting  
25 out and disrespecting his peers and teachers in February. As

1 the Administrative Law Judge correctly pointed out, there's no  
2 indication from that entry that the situation that began in  
3 February of 2018 lasted or could be expected to last for  
4 12 months as required under the statute and regulation.

5 The focus, really, is on -- and I also note at page  
6 67, of course, Dr. Lieber-Diaz, who's an expert in the area of  
7 Social Security, based on his review of available materials,  
8 concluded there was less than marked limitation in this area.

9 The focus under *Brault*, really, is whether these two  
10 findings of fact are such that a reasonable factfinder reviewing  
11 this record would have to conclude that there was a marked or  
12 better -- higher limitation in these two areas, and we are not  
13 able to say that, another Court might disagree, as Judge Larimer  
14 might under these circumstances, but applying the deferential  
15 standard that controls, I conclude that the determination was  
16 supported by substantial evidence and correct legal principles  
17 were applied. I'll, therefore, grant judgment on the pleadings  
18 to the defendant and order dismissal of plaintiff's complaint.

19 Thank you both for excellent presentations. Stay  
20 safe.

21 MS. PALMER: Thanks, your Honor. You, too.

22 MR. RAPPAPORT: Thank you, your Honor.

23 (Time noted: 1:51 p.m.)  
24  
25

1  
2 CERTIFICATE OF OFFICIAL REPORTER  
34  
5 I, HANNAH F. CAVANAUGH, RPR, CRR, CSR, NYACR,  
6 NYRCR, Official U.S. Court Reporter, in and for the United  
7 States District Court for the Northern District of New York, DO  
8 HEREBY CERTIFY that pursuant to Section 753, Title 28, United  
9 States Code, that the foregoing is a true and correct transcript  
10 of the stenographically reported proceedings held in the  
11 above-entitled matter and that the transcript page format is in  
12 conformance with the regulations of the Judicial Conference of  
13 the United States.  
1415 Dated this 10th day of November, 2020.  
1617 x Hannah F. Cavanaugh18 HANNAH F. CAVANAUGH, RPR, CRR, CSR, NYACR, NYRCR  
19 Official U.S. Court Reporter  
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